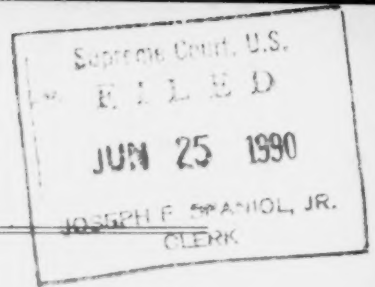


No. 89-1892



In The
Supreme Court of the United States
October Term, 1989

DOROTHY GONZALES,

Petitioner,

v.

NEW MEXICO EDUCATIONAL RETIREMENT
BOARD AND FRANK READY, DIRECTOR,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

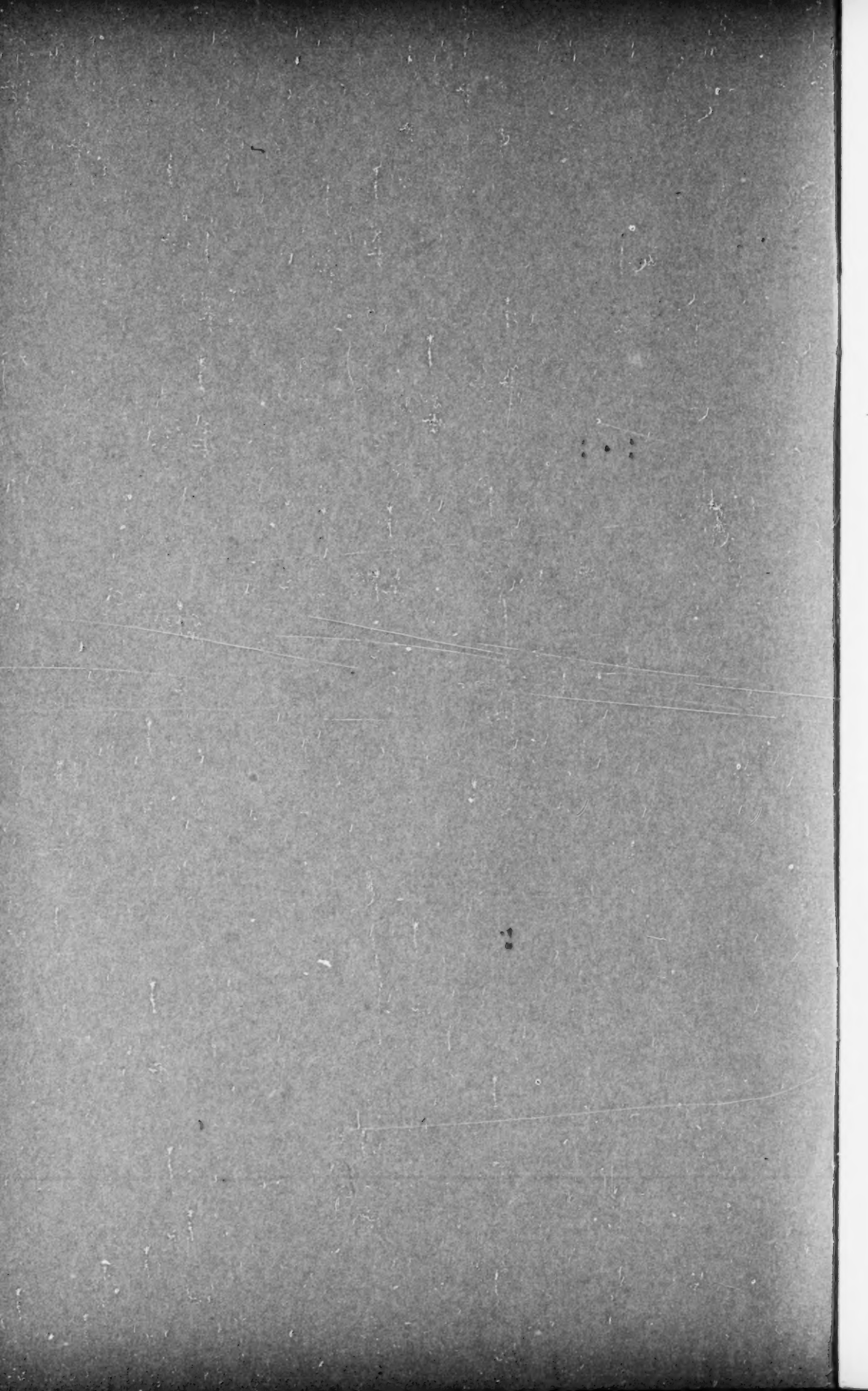
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QUESTIONS PRESENTED

1. Whether Petitioner may recover attorney's fees under 42 U.S.C. §1988 in this state mandamus action where she alleged invalidity of a state regulation under state law and under the United States Constitution and prevailed on her state claim but did not prevail on her alleged federal claim under 42 U.S.C. §1983?

2. Whether the question Petitioner raises in this Court is moot, because Respondents are not "persons" under 42 U.S.C. §1983 and thus are not amenable to an award of attorney's fees under 42 U.S.C. §1988?

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JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257, not under §1254 (1) as recited in her petition.

STATEMENT OF THE CASE

Petitioner is a disability retiree under the Educational Retirement Act ("ERA"), NMSA 1978, §§22-11-1 to -45 (Repl. Pamp. 1989). Before her retirement on disability, Petitioner had been a member of the educational retirement system as a school bus "owner/driver". School bus "owner/drivers" are eligible for ERA membership under regulations of the educational retirement board, although independent contractors generally are excluded from membership. Before her retirement on disability, Petitioner and her husband had maintained, jointly, school bus operation contracts with the Penasco school district.

Petitioner alleged that she became disabled in August of 1983 but did not file with Respondents an application for disability benefits under ERA until March of 1985. Respondents immediately commenced processing her application, but Petitioner refused to comply with ERB Rule VI(A)(2) until February of 1986, when she removed her name from the bus contracts she and her husband held with Penasco. Thereafter, and upon her reapplication for benefits, ERB awarded disability benefits effective July 1, 1986.

On October 9, 1987, Petitioner filed a mandamus action in state court under NMSA 1978, §§44-2-1 to -14

(Orig. Pamp.) against Respondents. Respondent educational retirement board is a state agency. Respondent Ready is its director. Petitioner sued Mr. Ready only in his official capacity as director. She made no allegations of personal liability against Mr. Ready.

Petitioner sued for retroactive disability benefits for the period from August 16, 1983 to July 1, 1986. Material to part of her claim for retroactive benefits, Petitioner alleged that ERB rule VI(A)(2) was unconstitutional as a denial of equal protection and due process and an impairment of contract and was invalid under state law. Petitioner sought attorney's fees under 42 U.S.C. §1988. The relief Petitioner sought was purely retrospective.

On October 29, 1987, a hearing was had resulting in an order that both parties appealed and in a remand for entry of a final judgment and peremptory writ of mandamus. Upon appeal from that judgment by both parties, the New Mexico Supreme court reversed the district court's award of attorney's fees, reversed the award of prejudgment interest and reversed, in part, the retroactive benefit award. The New Mexico Supreme Court held that ERB Rule VI(A)(2) violated state law; that Petitioner's case was not one to enforce 42 U.S.C. §1983; that her case did not rise to the level of a constitutional question; and that a constitutional resolution of the case was not necessary.

REASONS FOR DENYING THE WRIT

1. This Case Presents No Substantial Federal Question.

Petitioner did not prevail on her asserted 42 U.S.C. §1983 claims. Therefore, even if Respondents were

amenable to an attorney's fee award, Petitioner could not receive a fee award under 42 U.S.C. §1988. Petitioner cites no case holding that where a party asserts both a federal and a state cause of action and does not prevail on the federal cause but does on the state cause, he is entitled to attorney's fees under the federal statute. By its plain language, §1988 limits fee awards to a party who prevails in an action to enforce one of the federal civil rights laws. It does not provide for an award of fees in any other action. The district court's conclusions that Respondents had violated federal law were not upheld by the New Mexico Supreme Court. Because Petitioner did not prevail in proving a deprivation of federal constitutional rights, privileges or immunities in a §1983 action, Petitioner is not entitled to attorney's fees under §1988. *Chapman v. Luna*, 102 N.M. 768, 701 P.2d 367, cert. denied, 474 U.S. 947 (1985).

New Mexico courts do entertain 42 U.S.C. §1983 causes of action,¹ and, in such cases, permit the award of attorney's fees to a plaintiff who prevails.² But this case is not such a case. To claim a §1983 violation, Petitioner relies on Article 1, Section 10 of the United States Constitution (prohibiting laws that impair contracts) in arguing the unconstitutionality of ERB Rule VI(A)(2). However, §1983 was enacted to enforce the provisions of the Fourteenth Amendment. "Article 1, Section 10 of the Constitution is an independent obligation upon the states. . . . It is

¹ See, e.g., *Gomez v. Board of Educ.*, 85 N.M. 708, 516 P.2d 679 (1973).

² See, e.g., *Jacobs v. Stratton*, 94 N.M. 665, 615 P.2d 982 (1980).

not . . . part of the . . . constitutional rights guaranteed and protected by the Fourteenth Amendment." *Poirier v. Hodges*, 445 F.Supp. 838, 842 (M.D. Fla. 1978) (holding that the plaintiff failed to state a claim under §1983 for alleged violation of the contract clause of the constitution). Recently, this Court re-affirmed that "Section 1983 . . . was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment." *Ngiraningas v. Sanchez*, 110 S. Ct. 1737 (1990) (quoting *Quern v. Jordan*, 440 U.S. 332, 354 (1979)). Petitioner, therefore, did not state a §1983 claim with respect to her claim that ERB Rule VI(A)(2) impaired her contract rights.

Petitioner also urged, without evidentiary support, that ERB Rule VI(A)(2) denies equal protection, because it allegedly treats bus drivers differently from other members in requiring that they terminate their bus contracts to receive disability benefits. That assertion is not correct. Other ERA members such as teachers, who are on contract with the school districts, could not receive disability benefits under ERA unless they terminated their employment contracts. ERB Rule VI(A)(2) merely sought to treat all members the same. Petitioner wanted favored treatment. For example, teachers who become disabled could not cease rendering services; hire a family member or other person to substitute for them; and continue to receive income under the certified school instructor contract. Petitioner did not prove a §1983 equal protection violation.³

³ Nor did Petitioner prove a substantive due process claim. Generally, substantive due process limits the ability of a

Petitioner's complaint that the New Mexico Supreme Court decided the validity of ERB's rule based on state law does not provide a jurisdictional basis in this Court to review that decision. This Court has long held that it will not consider a federal law question on review of a state court judgment if that judgment rests on an "independent" and "adequate" state law ground. *Harris v. Reed*, 109 S.Ct. 1038, 1042 (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). A state court's "plain statement" that its decision rests on state law grounds forecloses review by this Court. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Since *Long*, this Court has repeatedly followed the "plain statement" rule. *Harris* at 1042, n. 7. In Petitioner's case, the New Mexico Supreme Court "plainly stated" that its decision about the validity of ERB Rule VI(A)(2) was based solely on state law. Petitioner may not seek review in this Court of the New Mexico Supreme Court's decision in that regard.

The cases Petitioner cites do not support her claim for attorney's fees even though she did not prevail before the state's highest court upon her asserted federal claims. Petitioner states that the decision in her case is contrary to *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 109 S.Ct. 1486 (1989) (petition at 9). But *Garland* is not pertinent to this case. In *Garland*, a federal §1983 suit, the plaintiff had prevailed, in part, on her §1983 claims.

(Continued from previous page)

legislature or congress to enact legislation in areas involving certain fundamental rights. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The issue this Court decided in *Garland* was the proper test to apply in determining attorney's fees entitlement to a plaintiff who partially prevails in a §1983 suit.

This case does not present the issue whether New Mexico courts *must* entertain §1983 claims (petition at 9-12). Petitioner's contract claim is not a §1983 claim; her equal protection claim is without evidentiary support and is refuted by a comparison to other contract employees, such as teachers; and her substantive due process claim lacks evidentiary and authoritative support. The state cases Petitioner cites as reflecting conflict (petition at 13) do not evidence conflict on the issue whether attorney's fees can be awarded under §1988 to a plaintiff who does not prevail on §1983 claims.

The New Mexico Supreme Court correctly ruled that Petitioner's action was not one to enforce §1983; that her case did not rise to the level of a constitutional question; and that a constitutional resolution of her case was not necessary. This Court should decline review, because this case presents no substantial federal question.

2. Respondents Are Not "Persons" Under 42 U.S.C. §1983 In This Action, And, Therefore, The Question Petitioner Raises is Moot.

In her mandamus action, Petitioner sued a state agency and its director in his official capacity only as director. Petitioner sought purely retrospective relief, specifically, a sum of money from the retirement fund,⁴

⁴ The educational retirement fund is in the custody of the state treasurer. §22-11-11.

representing a retroactive benefit award. Her desired recovery, therefore, was indistinguishable from an award of damages against the state.

In *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989), this court held that a state agency and a state officer sued in his official capacity in a §1983 action for damages are not "persons" under §1983. Respondents, likewise, are not "persons" under §1983, and, therefore, attorney's fees may not be awarded against them under §1988.⁵ The issue Petitioner raises is moot, because even if she proved a §1983 claim, Respondents are not, in this action, amenable to §1983 liability and to §1988 attorney's fees.

CONCLUSION

Respondents respectfully pray that this Court deny Petitioner's petition for writ of certiorari to the New Mexico Supreme Court.

Respectfully submitted,

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⁵ Although not addressed by the New Mexico Supreme Court in its opinion in this case, Respondents vigorously argued, as point I to their brief-in-chief on cross-appeal, that attorney's fees could not be awarded against them, because they were not "persons" under §1983.